

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF U S WEST)	
COMMUNICATIONS, INC.'S MOTION FOR)	CASE NO. USW-T-00-3
AN ALTERNATIVE PROCEDURE TO)	
MANAGE ITS SECTION 271 APPLICATION.)	COMMISSION DECISION ON
)	QWEST CORPORATION'S
)	COMPLIANCE WITH SECTION 271
)	PUBLIC INTEREST AND TRACK A
)	REQUIREMENTS AND SECTION
)	272 STANDARDS

INTRODUCTION

When the Federal Communications Commission (FCC) reviews an application by a Bell Operating Company (BOC), which includes Qwest, for authority to provide interLATA telecommunication services, the FCC may not give its approval unless it finds “that the requested authorization is consistent with the public interest, convenience and necessity.” 47 U.S.C. § 271(d)(3)(C). The FCC has determined the public interest standard in Section 271(d)(3)(C) requires a Performance Assurance Plan (PAP) that provides detailed performance standards for the BOC’s delivery of services to competitor telecommunications providers and automatic penalties if the standards are not met. The Commission issued a decision on Qwest’s PAP on March 7, 2002. This decision examines the public interest issues outside of the PAP.

The FCC must also find that “the requested authorization will be carried out in accordance with the requirements of Section 272.” 47 U.S.C. § 271(d)(3)(B). Section 272 requires the BOC to provide interLATA services, once approved, through a separate affiliate independent from the BOC. 47 U.S.C. § 272(a) and (b). In this decision the Commission also reviews the record created on Qwest’s compliance with Section 272.

Finally, the Commission in this decision addresses issues relevant to the dual tracks to interLATA approval set forth in Section 271(c)(1). Under Paragraph A of that section (“Track A”), Qwest may obtain interLATA authorization, assuming all other Section 271 requirements are met, if it “has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or

more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers.” In other words, Qwest must actually be providing access to its network to another telecommunications company pursuant to an approved interconnection agreement, and the other company must be providing service to residential and business customers. The Track B route to FCC interLATA authorization, Paragraph B of Section 271(c)(1), does not require actual interconnection between Qwest and another company’s facilities. Instead, Qwest must have a valid Statement of Generally Available Terms (SGAT) setting forth terms for other providers to interconnect to Qwest’s network and facilities. This decision, in addition to public interest and Section 272 standards, reviews the record on the Track A requirements and residual issues on Qwest’s SGAT.

BACKGROUND

On February 8, 2000, Qwest Corporation, formerly U S WEST Communications, Inc., filed a Notice of Intention to File a Section 271 Application and a Motion for Alternative Procedure to Manage the 271 Process. In response the Commission issued Procedural Order No. 28450 approving its participation in a multi-state workshop process to develop a record on Qwest’s compliance with the Section 271 requirements.

The seven states participating in the multi-state workshop process retained an outside Facilitator “to conduct a joint process to develop a factual record and consider aspects of Section 271 through collaborative workshops.” The Facilitator conducted workshops to receive evidence and establish a record to be filed in each state. The Facilitator was directed to prepare and submit a report on the agreed upon and unresolved issues in each workshop and make recommendations for the resolution of disputed issues.

The Facilitator filed two reports for the issues relevant to this decision. The first report was filed September 21, 2001, and addressed general terms and conditions for Qwest’s SGAT, Section 272, and Track A requirements. The second report was filed October 22, 2001, and addressed public interest issues, exclusive of the QPAP.

Interested parties were provided an opportunity to file written comments, including exceptions, with the Commission within ten days of the filing of the reports. Written comments were filed by Qwest, the Commission Staff, AT&T Communications of the Mountain States, Inc., and Touch America, Inc. The Commission established a hearing for oral argument on December 3, 2001, notifying the parties that the oral argument would be “limited to Track A

requirements, separate affiliate requirements of Section 272, general terms and conditions, and the public interest issues exclusive of the QPAP.”

GENERAL TERMS AND CONDITIONS

The general terms and conditions component of the Facilitator’s report and record refers to terms for Qwest’s Statement of Generally Available Terms (SGAT) for access and interconnection to its network. The competitive checklist in Section 271(c)(2)(B) sets forth 14 different standards for interconnection a BOC must meet and then provide in an SGAT to satisfy the Track B option of Section 271. The SGAT must contain terms beyond those required to address the 14 checklist standards, however, to answer administrative details for a complex business arrangement between two competitors. The general terms and conditions component was added to the workshop proceedings and Facilitator’s report when it became clear the topic was significant and included numerous issues the parties were unable to resolve by a consensus.

The Facilitator’s report filed September 21, 2001, addressed the general terms and conditions record, and identified 19 issues resolved through the workshops. Eighteen issues remained for resolution by the Facilitator, including SGAT language for resolving conflicts between the SGAT and other documents, and the ability of a competitor to opt in to other effective interconnection agreements with Qwest.

In its comments filed on general terms and conditions, Qwest stated, although it did not agree with all the proposed resolutions, it “will implement the [Facilitator’s] report in full and file SGAT language that complies with the report.” Qwest Comments p. 4. One issue was not resolved by the report, however, because “the record did not allow an assessment of Qwest’s compliance with FCC requirements applicable to change management process.” Facilitator’s Report Summary p. 6. Qwest’s comments state that discussions on the change management process (CMP) were still occurring and that the parties have “agreed to report on the progress of these discussions at later dates.” Qwest Comments p. 12. At the oral argument, Qwest stated the CMP “will be addressed in detail in the ROC OSS report, and Qwest does not believe there is anything further needed from this Commission until receipt of the ROC OSS Report.” Tr. p.110-111. The ROC OSS Report refers to the testing of Qwest’s operational support system (OSS) under the auspices of the Regional Oversight Committee (ROC). The final draft report is scheduled for filing on April 19, 2002.

In its written comments regarding general terms and conditions, Staff stated it “supports the Facilitator’s findings and recommends that this Commission adopt them as set forth in the report.” Staff Comments p. 3. The only other written comments regarding the general terms and conditions issues were filed by AT&T. AT&T in its comments first states a general complaint that the Facilitator’s report and the workshops on general terms and conditions “shift the burden of proof to the competitive local exchange carriers (CLECs) to prove Qwest’s non-compliance and completely ignores the fact that Qwest provided little or no evidence in support of its SGAT claims of compliance.” AT&T Comments p. 1. AT&T also asserts generally that the Facilitator’s report “highlights instances wherein the Facilitator ignores the law, misunderstands the SGAT language or speculates about facts not in evidence in the record.” AT&T Comments p. 3.

The Facilitator properly characterized the SGAT as “an offer for an agreement between Qwest and any requesting CLEC.” Facilitator’s Report p. 15. The general terms and conditions part of the SGAT governs the relationship between the CLEC and Qwest, but are themselves not part of the Section 271 checklist requirements. Facilitator’s Report p. 15. In this context, and without greater specificity in AT&T’s complaint, there is no basis for AT&T’s contention that the Facilitator shifted the burden of proof on the general terms and conditions. The Commission is generally well pleased with the Facilitator’s understanding and conduct of the workshop process, as well as the many complex issues involved.

AT&T also raised several specific objections to the Facilitator’s report on general terms and conditions. For example, AT&T argued its evidence shows that Qwest has not complied with certain “pick and choose” requirements in the Telecom Act. During the workshops AT&T presented evidence of Qwest’s dealings with AT&T in Wyoming, “showing Qwest’s abusive conduct of trying to make AT&T opt-into more and wholly unrelated contract provisions than were required or requested to obtain the particular interconnection provision needed.” AT&T comments p. 7. AT&T conceded “the SGAT language itself was not the problem,” and instead its complaint was on Qwest’s apparent business practice.

The Facilitator’s report reflects careful and thorough consideration of the issues raised by AT&T. The Facilitator either rejected or addressed these specific issues in proposing resolution to the general terms and conditions disputes. After reviewing the report and record, as

well as AT&T's written comments, the Commission is satisfied with the proposed resolution provided by the Facilitator on the issues identified by AT&T.

The Commission does approve, however, two specific recommendations made by AT&T. First, AT&T noted that the parties were still working at the close of the workshops toward consensus on certain SGAT definitions, and that the agreed upon definitions should be included in the most recent SGAT. The Commission agrees that the SGAT should be updated with any definitions or other terms on which Qwest and the CLECs were able to agree. Second, the Commission approves the clarifying language proposed by AT&T for Section 5.12.2 of the SGAT addressing the effect of the sale of exchanges by Qwest. AT&T recommended the word "unaffiliated" be stricken in its reference to the parties to which Qwest may transfer an exchange. In addition, AT&T recommends that the phrase "completion of" be included in its reference to the timing for the notice required of a transfer. With these changes the first part of Section 5.12.2 is as follows:

In the event that Qwest transfers to any ~~unaffiliated~~-party exchanges including end users that a CLEC serves in whole or in part through facilities or services provided by Qwest under this SGAT, the transferee shall be deemed a successor to Qwest's responsibilities hereunder for a period of 90 days from notice to CLEC to completion of such transfer or until such later time as the Commission may direct pursuant to the Commission's then applicable statutory authority to impose such responsibility either as a condition of the transfer or under such other state statutory authority as may give it such power.

With these changes, the Commission approves and adopts the Facilitator's recommendations on the resolution of disputes for the SGAT general terms and conditions.

TRACK A

The term Track A refers to Paragraph A of Section 271(c)(1) entitled "Presence of a Facility's Based Competitor." That paragraph provides as follows:

A Bell Operating Company meets the requirement of this subparagraph if it has entered into one or more binding agreement that has been approved under Section 252 specifying the terms and conditions under which the Bell Operating Company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing provider of telephone exchange service (as defined in Section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own

telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

In his report, the Facilitator identified the four issues set forth by the FCC in evaluating the evidence on the requirements to satisfy Track A. The four issues are (1) whether the BOC has signed one or more binding agreements that has been approved under Section 252, (2) whether the BOC is providing access and interconnection to unaffiliated competing providers of telephone exchange service, (3) whether there are unaffiliated competing providers of telephone exchange service to residential and business customers, and (4) whether the unaffiliated competing providers offer telephone exchange service exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange facilities in combination with the resale of the telecommunication services of another carrier. Facilitator's Report p. 30. It is not necessary that competitor providers have achieved a specific market share before Track A can be satisfied. The Facilitator noted that "the FCC has already decided that it will not impose a market share test and it has deemed Track A to be satisfied at very low CLEC levels of penetration into the residential market." Facilitator Report at p. 35.

The Facilitator reviewed the evidence on each of the four Track A requirements and concluded that Qwest had not presented evidence to satisfy the third element. Specifically, the Facilitator stated that, at least for Idaho, "Qwest should be found to have not met Track A standards, for reasons of its failure to provide substantial evidence that competitors were serving residential end-users." Faciliator's Report p. 3.

Qwest requested an opportunity to supplement the record to demonstrate the existence of competitor providers for Idaho residential customers, and the Commission granted Qwest's request in Procedural Order No. 28866. Qwest subsequently filed supplemental evidence consisting of affidavits and documentation to demonstrate competition in some residential markets in Idaho. The supplemental evidence indicates that Leap Wireless, a facilities based broad-band PCS carrier is offering its "Cricket" brand wireless service as a substitute to wireline local exchange service. In addition, Qwest's supplemental information identifies McLeod Telecommunications and Project Mutual Telephone Company as providing residential services that satisfy the requirement of actual competitive residential services for Track A approval.

Written comments were filed regarding the Track A requirements by Qwest, AT&T and the Commission Staff. AT&T's comments in part are specific to Montana and Wyoming. The only issue it identifies for a more general application is regarding the method for estimating CLEC facilities based line counts. That issue was presented to and fully considered by the Facilitator, and the Commission approves the resolution in the Facilitator's report.

In its written comments Staff stated that, despite the supplemental information provided by Qwest, it still has reservations regarding the level of residential competition in Idaho. Staff identified the lack of established prices for Qwest's unbundled network elements as a possible explanation for a relatively low residential penetration level by CLECs. Staff stated it "is not convinced the record demonstrates that Qwest has fully and irreversibly opened the local telecommunications market to competition for residential customers." Staff October 20, 2001 Comments p. 7. Staff revisited the issue of market penetration in later comments, however, after Qwest filed its supplemental information. After noting that the existence of competition in the residential telecommunications market in Idaho is "de-minimus," Staff nonetheless stated, "based upon the guidelines established by the FCC, Qwest seems to have met its obligation [under Track A] and Staff therefore recommends this matter be considered closed." Staff November 1, 2001 comments p. 9.

The Commission is aware, and the Facilitator noted, that the FCC has not determined a specific market share of residential service by competitors must exist in order to satisfy Track A. By the language of the Track A paragraph, it is enough if there is even one approved interconnection agreement by which Qwest "is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service...to residential and business subscribers." The Commission finds that the supplemental information filed in the record by Qwest establishes the presence of a provider providing service to residential and business customers in Idaho. The Commission accordingly finds that Qwest satisfies the Track A requirements.

SECTION 272: SEPARATE AFFILIATE REQUIREMENTS

Section 272 of the Telecommunications Act requires a BOC to provide interLATA services, once approved, through affiliate entities separate from the BOC. This section thus imposes significant structural safeguards to the BOC's provision of interLATA services. The Facilitator summarized the Section 272 requirements for Qwest as follows:

1. Qwest must provide in-region interLATA service through an affiliate that is separate from Qwest Corporation, the BOC;
2. The separate affiliate must maintain books, records and accounts in the manner prescribed by the FCC, which must be separate from books, records and accounts maintained by Qwest;
3. The separate affiliate must have separate officers, directors and employees from those of Qwest;
4. Transactions between the affiliate and Qwest must be conducted on an arms length basis with any such transaction reduced to writing and available for public inspection;
5. Qwest may not discriminate in favor of its affiliate in any dealings between the two entities;
6. Qwest must account for all transactions with its affiliate in accord with FCC accounting principles.

Qwest has designated Qwest Communications Corporation (QCC) as the Section 272 affiliate. QCC is wholly-owned by Qwest and is the entity through which Qwest provided interLATA services prior to its merger with U S WEST Communications.

In his report the Facilitator reviewed the evidence on each of the requirements contained in Section 272. The Facilitator identified significant problems in the requirements that Qwest maintain separate books and records for the affiliate. The Facilitator therefore recommended that Qwest be required to arrange for an independent review, covering the period from April to August of 2001, to determine:

- (a) whether there has been adequate action to assure the accurate, complete, and timely recording in its books and records of all appropriate accounting and billing information associated with Qwest/QCC transactions,
- (b) whether the relationship between Qwest as a vendor or supplier of goods and services and QCC has been managed in an arms-length manner, including, but not necessarily limited to a consideration of what would be expected under normal business standards for similar contracts with an unaffiliated third party, and
- (c) whether there are reasonable assurances that a continuation of the practices and procedures examined will continue to provide a level of

accuracy, completeness, timeliness and arms-length conduct found in examining the preceding two questions.

Facilitator's Report p. 14. Except for the booking of certain transactions identified by the Facilitator, the Facilitator concluded that Qwest has satisfied each of the separate affiliate requirements of Section 272.

In response to the Facilitator's recommendation, Qwest asked KPMG to provide the additional review and then filed KPMG's supplemental report on November 15, 2001. The KPMG report summarized the transactions it reviewed for the designated period to determine whether accounting for the transactions complied with Section 272 and associated FCC rules and regulations. KPMG noted several instances where Qwest did not comply with the FCC's affiliate transaction pricing rules, did not properly process accounting entries and affiliate billings, and did not reduce to writing certain services provided between Qwest and QCC. Except for the instances noted, KPMG concluded that Qwest had complied, in all material respects, with the Section 272 accounting requirements for the period from April 1, 2001 to August 31, 2001.

Along with the supplemental KPMG report, Qwest filed affidavits of accounting employees providing explanations for the discrepancies noted by KPMG, and asserting that corrective action had been or would be taken by Qwest. For example, the affidavit of Judith L. Brunsting states that Qwest corrected all of the identified discrepancies, and that QCC "has also implemented and is in the process of implementing several new internal controls intended to provide reasonable assurance that inter-company transactions initiated by the 272 affiliate are identified, reduced to writing, accurately processed and posted." Based on the KPMG report and representations by Qwest, Staff asked that Qwest perform a follow-up review by an independent third party to verify that the discrepancies identified in the report had been properly booked and that the corrective steps had actually been implemented. Qwest stated at oral argument its agreement to the additional review, Tr. p. 134-135, and subsequently filed a follow-up review by KPMG on December 19, 2001.

Staff in its written comments did not make a specific recommendation regarding Qwest's compliance with the Section 272 separate affiliate requirement. Staff concurred with the recommendation made by the Facilitator that the follow-up review be conducted by KPMG, and expressed some frustration in its written comments that Qwest had complicated the

Section 272 review by reorganizing and changing its designation of a separate affiliate. During the oral argument hearing, Staff indicated its belief that the bookkeeping issues would be resolved by the supplemental review to be conducted by KPMG. Staff also indicated, however, that it had requested additional information from Qwest and, after reviewing it, Staff would file supplemental comments on any remaining Section 272 issues. Tr. p. 136. Staff has not yet filed its supplemental comments. No other written comments were filed regarding the Section 272 separate affiliate requirements.

Based on this record and the Facilitator's report, the Commission conditionally finds that Qwest has put in place a separate affiliate to comply with the requirements of Section 272, but will reserve a final decision until Staff has filed its supplemental comments. The Commission will accept the supplemental comments to be filed by Staff, and will address any additional Section 272 issues in a subsequent decision. The Commission also notes that Section 272(d) requires Qwest to obtain an audit every two years to determine whether it is properly complying with Section 272 and FCC regulations for separate affiliate transactions. Qwest is required to file those audits with each state commission, and this Commission will continue to monitor Qwest's separate affiliate obligations.

PUBLIC INTEREST

In addition to the other requirements for approval of interLATA authority for Qwest, Section 271(d)(3)(C) precludes FCC authorization absent a determination that "the requested authorization is consistent with the public interest, convenience and necessity." Public interest issues, other than the QPAP, were the subject of the Facilitator's October 22, 2001 Report. Evidence on a number of issues were presented at the workshops, including the establishment of unbundled network element (UNE) prices, the level of competition that exists in Qwest's service territory, and prior conduct of Qwest as it relates to opening its markets to competition.

Written comments were filed on the public interest issues by AT&T, the Commission Staff and Touch America. In its comments, AT&T presented the same arguments it had presented to the Facilitator. Each of these issues has been properly addressed in the Facilitator's Report. In its comments, Staff addressed several issues, but was primarily concerned with the lack of UNE prices in Idaho. In its very brief comments, Touch America identified two areas concerning Qwest's performance as it relates to public interest. Touch America provided no discussion, but identified the following as its concerns:

1. Qwest wholesale billing practices and customer impacting service issues.
2. Qwest marketing and provisioning of interLATA services under the guise of lit capacity IRUs [indefeasible right of use] to customers in Idaho.

Touch America Comments p. 2. Touch America did subsequently provide to the Commission a copy of its complaint against Qwest filed at the FCC on these issues.

The primary argument addressed by the Facilitator regarding UNE prices was the relationship between the UNE prices and Qwest's retail rates. AT&T contended that, because Qwest's UNE rates exceed its retail rates, competitors cannot profitably enter the telecommunications market in Qwest's territory. Responding to AT&T's argument, the Facilitator quoted from the FCC's Order approving the application of SBC for interLATA authority in Kansas and Oklahoma. Regarding an upside down gap between UNE prices and retail rates, the FCC stated that "the Act requires that we review whether the [UNE] rates are cost-based, not whether a competitor can make a profit by entering the market." The Facilitator nonetheless was unable to determine whether Qwest's UNE prices are consistent with the public interest, stating that "whether or not Qwest UNE rates meet the checklist remains a question not resolved by these workshops." Facilitator's Report p. 6.

This Commission also is unable to determine whether Qwest's UNE prices are consistent with the public interest because Qwest has not established UNE prices for its Idaho services. The only UNE prices established for Qwest's Idaho services are found in an interconnection agreement resulting from a formal arbitration between AT&T and U S West. That agreement is dated July 27, 1998, and by its terms was effective for a three year period, although it also states that it "shall thereafter continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the parties." There is no evidence showing that Qwest's UNE prices reached through an arbitration that occurred four years ago satisfy current FCC TELRIC pricing requirements, that the arbitrated rates are currently effective because AT&T continues to purchase UNEs from the arbitrated prices, or that the UNEs identified in the interconnection agreement meet the complete list of UNEs now required for pricing.

The lack of UNE prices for Qwest remains a gap in Qwest's record for compliance with the Section 271 requirements. The Commission notes that a docket is underway in Idaho to establish UNE prices for Qwest, Case No. QWE-T-01-11, but that case is currently not

scheduled for completion. Until UNE prices are established for Qwest in Idaho, the Commission cannot conclude that Qwest has satisfied all of the FCC requirements for approval of Section 271 interLATA service authority.

CONCLUSION

The Commission adopts the September 21, 2001 report and October 22, 2001 report filed by the Facilitator. With regard to general terms and conditions, the Commission approves the resolution of disputes as proposed by the Facilitator, and approves two language changes recommended by AT&T. Qwest must revise its SGAT with the changes adopted or approved by the Commission. In addition, the Commission will review the change management process results Qwest will provide as part of the OSS test results.

The Commission finds Qwest has presented sufficient evidence to satisfy the Track A standard set forth in 47 USC 271(c)(1). Regarding the Section 272 separate affiliate requirements, the Commission will reserve its final decision until supplemental comments are filed by Staff. Finally, the Commission cannot find Qwest in compliance with public interest standards until UNE prices that satisfy the FCC's TELRIC standards are established.

This decision of the Commission is the last decision resulting from the workshops and reports filed by the Facilitator. Like his previous reports, the Facilitator's reports on general terms and conditions, Track A, Section 272 and public interest issues demonstrate careful and thorough analysis and discussion of the issues by all parties. The Commission appreciates the tremendous effort by the parties and the Facilitator to clarify difficult issues, present cogent arguments, and compile a detailed record for review by this Commission and the FCC.

The final draft report on the OSS test is scheduled to be filed with the participating state commissions later this month. Within 14 days of the draft report, the parties may file comments regarding the results of the test, and the Commission will include those comments in the record it will provide to the FCC.

DATED at Boise, Idaho this day of April 2002.

PAUL KJELLANDER, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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